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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 527

HARRY C. TRENTMAN AND AUBREY MILNER,
Co-Partners, Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO, A MUNICIPAL CORPORATION; BOARD OF WATER COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO; and GEORGE R. MORRISON, RAYMOND W. JOHNSON, AUGUST P. GUMLICK, NICHOLAS R. PETRY and ROBERT S. KOHN, MEMBERS OF THE BOARD OF WATER COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled matter on August 27, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 66), printed in Appendix A hereto, *infra*, p. 7, is reported as *Trentman v. Denver* in 129 F. Supp. 624. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, p. 13, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1956. (R.A-11, Appendix C, *infra*, p. 18). No petition for rehearing in that court was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether the District Court sufficiently complied with Rule 52(a), Federal Rules of Civil Procedure; whether, assuming such compliance, the findings of the District Court were clearly erroneous; and whether the courts below erroneously reversed the burden of proof.

STATEMENT

The amended complaint (R. 1) charges the conversion by the defendants (here the respondents) of two water systems in the City and County of Denver, Colorado. The systems are separately the subjects of Counts I and II of the amended complaint and separate judgments were sought with respect to them (R. 5). The petitioners have elected not to seek a writ of certiorari as to Count II (R. 3) which was the subject of the third-party complaint below against Sam H. Schaefer (R. 20), and this application is addressed only to the separate judgment on Count I (R. 74). Count I involves only one of the systems and only the respondents named in the caption of this proceeding.

The jurisdiction of the District Court was invoked because of diversity of citizenship. The plaintiffs were partners (R. 2), the two survivors being citizens of Texas, the third plaintiff (now deceased, R. 66) being a citizen of Kansas, and the defendants citizens of Colorado.

As affirmative defenses the defendants pleaded (R. 8, 11, 14, 15, 18, 19) that the plaintiffs had received repayment of their investment in the water system involved in Count I and, therefore, had lost nothing by the taking of the system; that higher prices were charged by the plaintiffs for lots sold by them, and served by the system, because of such service and hence payment by that means had already been received; and that the plaintiffs had dedicated the system to the public use and had no recoverable interest in it. The case was tried without a jury. The District Court sustained the affirmative defenses by the opinion set forth in Appendix A, *infra*, p. 7, and accordingly entered judgment against the plaintiffs. On appeal to the Court of Appeals the judgment was affirmed, the opinion of that court appearing *infra*, p. 13. This opinion holds that the findings contained in the opinion of the District Judge (*infra*, p. 7) satisfy Rule 52(a) and that the evidence heard and considered by the District Judge was sufficient to sustain his findings and judgment. Rule 52(a) is reproduced in Appendix D hereto, *infra*, p. 18.

It is the position of the petitioners that the opinion of the District Judge is not sufficient, as findings of fact, to satisfy Rule 52(a); that, assuming the findings to be sufficient, they are clearly erroneous; and that both the District Court and the Court of Appeals based their judgments on the erroneous assumption that the plaintiffs must disprove the affirmative defenses, whereas the burden of sustaining such defenses was upon the defendants and was not met.

REASONS FOR GRANTING THE WRIT

1. There is necessity for authoritative determination of the meaning and application of Rule 52(a) with respect to the sufficiency of findings of fact. This case presents an important problem in that regard. *Hickman v. Taylor*, 329 U. S. 495. As is shown by the annotations to Rule 52(a) found in 28 U.S.C.A., Rule 52, pp. 16-92, literally hundreds of cases involving the rule have been decided, with many conflicts, and without bringing out any clear pattern. In the case at bar is a striking example of the result flowing from an opinion of a District Court in which the observations of the trial judge are not, in any proper sense, findings of fact, and in which statements of fact are mingled with arguments and inferences without basis in the evidence. *Cf., Mayo v. Lakeland Heights Can. Co.*, 309 U. S. 310, 316. Proper findings, as contemplated by Rule 52(a), are the result of skill and judgment, and will, when set down after careful consideration, often dispel strong impressions to the contrary theretofore entertained by the trial judge. *United States v. Forness*, 2 Cir., 125 F. 2d 928, 942-943. Such findings are not here present. A decision of this Court upon the sufficiency under Rule 52(a) of the opinion of the District Judge in the instant case will furnish badly-needed guidance to the judges of the District Court sitting without juries.

2. The findings of the District Judge, as contained in his opinion, resulted in shifting the burden of establishing the affirmative defenses from the defendants and fastening upon the plaintiffs the necessity of disproving them. The Court of Appeals put its seal of approval on this procedure, and as a consequence sanctioned a departure from the accepted and usual course of judicial proceedings which resulted in depriving the plaintiffs of their property without just or any compensation. It is sub-

mitted that this disposition of the Court of Appeals warrants the granting of the writ by this Court under the provisions of its Rule 19, 1(b). *Cf., Owen v. Commercial Union Fire Ins. Co.*, 211 F. 2d 488, 489.

3. The judgment of the District Court, affirmed by the Court of Appeals, was entirely without foundation in the evidence. The duty of the Court of Appeals, on such a record, was to correct the clear error thus appearing. *United States v. Yellow Cab Company*, 338 U. S. 338, 342. The failure of the Court of Appeals to examine the record and correct that error is such a departure from the accepted course of judicial proceedings as to warrant a review by this Court, as a matter of guidance for all Courts of Appeal. In this behalf, it is again emphasized that the uncertainties attending the sufficiency of findings of fact under Rule 52(a) should be dispelled, and the duty of the Courts of Appeal to correct manifest error made clear.

4. It is respectfully submitted that the judgment below represents a gross miscarriage of justice, warranting the interposition of this Court, for these reasons:

(a) The petitioners have been deprived, without any compensation, of property in which, as shown by the undisputed testimony, they had invested more than $150,000. The undisputed testimony also shows that the remaining value of the water system involved was $45,532.92, and that the plaintiffs had operated the system as a public utility, in many years at a loss, for more than 20 years before the taking by the defendants.

(b) The petitioners have been deprived of their property through the failure of the trial judge, approved by the Court of Appeals, to make proper findings of fact under Rule 52(a).

(c) The petitioners have been deprived of their property solely by the device of shifting to them the burden of disproving the affirmative defenses pleaded against them.

(d) The petitioners have, because of the error of the Court of Appeals in failing to set aside clearly-erroneous findings, been deprived of their property in violation of the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

BARKLEY L. CLANAHAN,

Counsel for Petitioners.

APPENDIX A

Opinion of the District Court

The plaintiffs, Aubrey Milner and Harry C. Trentman,[1] citizens of Texas, bring this action against the City and County of Denver, Colorado, a municipal corporation and the Board of Water Commissioners of the City and County of Denver, Colorado, all citizens of Colorado, to recover damages for the alleged conversion of two domestic water systems owned and formerly operated by the plaintiffs. Plaintiffs, in their first count, seek $107,407.66 for the Trent-Milner Water System (herein referred to as Bel-Adams System);[2] and, in their second count ask for $72,962.21 for the Schaefer Water System (herein referred to as Schaefer System).[3]

The defendants in answering deny they have converted property owned by plaintiffs; and, defendant Water Board counterclaims against plaintiffs to collect $790.12, plus interest, for an unpaid water bill. In addition, defendants have filed a third-party complaint against Sam H. Schaefer and ask to be indemnified for any judgment rendered against them as to the Schaefer system for the reason said System was sold to them by Schaefer under a warranted title.

The evidence applicable to plaintiffs' first cause of action indicates that plaintiffs began selling lots in the subdivisions which formed the first part of the Bel-Adams System in July of 1924. In promoting the sales of such

[1]One of the original plaintiffs, John L. Trentman, a Kansas citizen, has passed away since the institution of this suit.

[2]Originally, this system was known as the Bel-Adams Water System.

[3]Originally, this system was known as the Milner-Schaefer Water System.

lots plaintiffs advertised that water would be available;[4] and, in consummating sales used contracts which provided that purchasers pay $25.00 per 25 foot lot for water mains.[5] Under such contracts deeds were not given to the buyers until the complete purchase price, and the water main charges were paid. Subsequently, various subdivisions were added to the territory served by the Bel-Adams System.[6] The same technique was employed in the development of these later subdivisions with the exception that several of the later subdivisions were not promoted on the basis of separate charges for water mains.[7] However, the availability of water was publicized; and, its presence was reflected in a higher sales price.[8]

The evidence dealing with plaintiff's second cause of

[4]Illustrative of this was a five column advertisement in the September 12, 1926, issue of the Denver Post, wherein as to Belmont Park it was stated: "Water In Front of Every Lot." Also, see various leaflets used in advertising lots in Adams Park Annex, Bel-Adams City and Adams Gardens.

[5]For example, the pass book of a purchaser of lots in Belmont Park in 1924, contained the following provision: "In the event Trentman-Milner Company as agents for the sellers extends water lines to lot or lots covered by this contract, it is then agreed that the buyers shall pay the Trentman-Milner Company the sum of $25.00 for each lot covered by this contract at the time a tap is made on said water line, on or before or at the time the deed is executed."

Also, Witness Sam Schaefer testified that the purchasers of lots paid for the water meters which were installed. For corroboration of this see the three Plattner Manufacturing Company construction and operating contracts.

[6]Subdivisions wherein lot purchasers paid a separate price per lot for water main installation include Belmont Park, Belmont Park Annex, Adams Park, Adams Park 2d Filing, Adams Park Annex and Adams Garden.

[7]Such include Federal Park and Westwood Park.

[8]The cost of extending water mains on the Bel-Adams System to Federal Park was charged off as tract expense and was added to the price of the lots. In all additions, the meters and pipelines extending from the water mains in the streets to the hydrants (usually located in the yards) were purchased and paid for by the lot owners.

action which involves the Schaefer System indicates this System was installed in connection with the subdivision and sale of lots in Kentucky Gardens, Kentucky Gardens Annex, Westlawn and Preston's Addition. The first of these lots were sold by third-party defendant Sam Schaefer and plaintiff Milner, beginning in 1937. No separate charges for water mains were made to purchasers of lots in the just-mentioned subdivisions. However, in selling these lots served by the Schaefer System, the sellers advertised that water service was available and the purchasers took such representations into account in making their purchases. The expense of installing mains to serve the tracts under the Schaefer System was added to the price of the lots and was charged off as a tract expense.[9] As in the case of the Bel-Adams System, the purchasers of lots served by the Schaefer System paid for the meters and service lines leading from the water mains in the streets to their own property.

From 1928 until May 1, 1947, the City and County of Denver furnished water to the plaintiffs, which was resold by plaintiffs to the Bel-Adams consumers. Originally, the Schaefer System was supplied with water from its own well located in Kentucky Gardens. Subsequently, and for years prior to the annexation of all the land involved in this controversy on March 27, 1947, the Schaefer System was served by water obtained from the City and County of Denver.

At the time of annexation of the lands served by both the water systems in question, the Denver Water Board sent notices to the consumers stating that water would be sold at Denver rates directly to the various customers and

[9]For example, a part of the consideration for the contracts with the owners of Kentucky Gardens and Preston's Addition was the agreement that water mains would be installed to serve these two subdivisions.

that all water bills should be paid at the office of the Denver Water Board. The plaintiffs have neither protested the City's policy to directly supply water to the consumers nor made any effort to retain or regain control of either water system. In light of the just-summarized facts the Court has concluded that plaintiffs are not entitled to recover from the defendants on either of the two counts (or causes of action) for the following reasons:

1. Plaintiffs possess no such interest in either of the two instant water systems to support an action for conversion inasmuch as the beneficial interest in such systems was either sold to the property owners in the various additions when they purchased the lots;[10] or, such systems

[10]Read in particular fns. 5, 8 and 9, supra, and findings in connection therewith. Also, cf. Country Club District Service Co. v. Village of Edina, (Minn.) 8 N. W. 2d 321, 325, 326 (1943) where the Court said: "* * * When the residents of the Country Club District bought their lots and paid the purchase price agreed upon, they paid for something more than the real estate in the lots. When the statements made to them by Thorpe Bros. (sellers) are taken into account, it is evident that they were paying also a sum which represented their contribution as owners of the lots to the reimbursement of Thorpe Bros. for the cost incurred in installing the improvements. They were not attempting to buy any specific share in the systems or any part of the mains and piping fronting their lots. For this reason, the deeds in the lots did not attempt to convey or transfer any interest in any property of the systems. But the plain understanding between Thorpe Bros. and the buyers was that they, the buyers, were contributing their share to the payment of the improvements, which were public in purpose and which were to serve the community as a whole. What they paid for the law should and does give them. To the extent of the repayment made to Thorpe Bros. in the course of the sale of the lots, the community acquired a public right in the property of the systems, and to that extent Thorpe Bros. could no longer claim they owned the systems. * * *" Significantly, in the case at bar the evidence is convincing that plaintiffs have more than received back the amount they invested in installing the two systems in question.

Also, cf. Royal Oak Township v. City of Ferndale (Mich.) 15 N. W. 2d 707, 709, 710 (1944): "It is important to consider the character of ownership or of right of control that the township had in the water mains in suit at the time of annexation, and the character of such ownership or right of control, if any, that passed to the defendant city as the result of the annexation. We have already stated that the portion of the township water system in the annexed area was paid for with money obtained from property owners to whom the service was to be rendered. Under such circumstances

must be deemed dedicated to the public use in the areas in question.[11]

2. Apart from the issue of ownership there has been no taking or appropriating of the property in question so as to amount to an act or acts of conversion by the defendants.[12]

Defendant Water Board is entitled to judgment on its counterclaim for $790.12, plus interest at 6% per annum from May 1, 1947.

In light of the Court's expressed views it is unnecessary to discuss any of the other features of this case which

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[10] (Cont'd)

we do not think it can be said with accuracy that the water system when installed became the property of the township in the sense that it was the absolute beneficial owner of the same. * * *"

[11]As stated in City of Danville v. Forest Hills Development Corp. (Va.) 182 S. E. 548, 550 (1935): "* * * It, moreover, seems plain that when the water mains, pipes, etc., were constructed by the plaintiff as an inducement to the purchase of its lots, the plaintiff thereby dedicated said mains and pipes to the use of the lot owners, and has no right to claim adverse ownership in or remove same without such lot owners' consent.". Also, as observed in Suburban Real Estate Co. v. Incorporated Village of Silverton (Ohio), 167 N. E. 474, 476 (1929): "* * * We are of opinion that, having sold the lots on the representation of furnishing water, and a means having ing been provided therefor, the Real Estate Company would not be heard to claim ownership in the water mains, with right to remove the same." See, also, Ford Realty & Construction Co. v. City of Cleveland (Ohio) 164 N. E. 62, (1928).

[12]As mentioned in the Ford Realty & Construction Co. case, fn. 11, supra, p. 63: "* * * But aside from this, if the Ford Realty & Construction Company owned title to these pipes at that time, they own it now, and there is nothing to prevent them from taking them, if their position is right." Read, also, Suburban Real Estate Co. v. Incorporated Village of Silverton, fn. 11, supra, p. 476; Hightower et ux. v. City of Tyler (Tex.) 134 S. W. 2d 404, (1939); South Memphis Land Co. v. City of Memphis (Tenn.) 74 S. W. 2d 209 (1932); and, Wilkinson v. City of Shreveport (La.) 165 So. 471 (1936).

This Court, in reviewing the many authorities dealing with the problem at hand wholeheartedly agrees with the observation made by the Court in the Country Club District Service Co case, fn. 10, supra, p. 325: "The significance of these cases lies not so much in the analytical validity of the reasons given as in the fact that the basic sense of justice so appealed to these courts that they had no hesitation in deciding as they did. * * *".

were raised at the time of trial and dealt with in the submitted briefs.

Within 15 days counsel should submit a journal entry which conforms with this opinion.

Dated this 11th day of March, 1955.

W. R. WALLACE

United States District Judge.

APPENDIX B

Opinion of the Court of Appeals

BRATTON, Chief Judge.

The disputation in this action revolves around two water systems consisting of tanks, pumps, pipe service lines, valves, fittings, meters, and other equipment, installed for the purpose of supplying water to the inhabitants of certain subdivisions adjacent to the City and County of Denver, Colorado. John L. Trentman, Harry C. Trentman, and Aubrey Miller, a co-partnership, instituted the action against the City and County of Denver, the Board of Water Commissioners of the City and County and the members of the board. The amended complaint was in three counts. The first count charged the wrongful conversion of the Bel-Adams Water System. The second count charged like conversion of the Schaefer Water System. And the third count was for an accounting for sums received from consumers of water after the conversion charged in the first and second counts. By third-party complaint, Sam H. Schaefer was made a third-party defendant. The defendants and the third-party defendant denied liability and interposed affirmative pleas. And by counter-claim and cross-claim, the third party defendant sought affirmative relief. The court entered judgment determining among other things that the plaintiffs take nothing upon the amended complaint and that the third-party defendant take nothing on the counter-claim and cross-claim. Plaintiffs and the third-party defendant perfected separate appeals.

The judgment is attacked upon the ground that the court failed to make sufficient findings of fact. Rule of Civil Procedure 52(a), 28 U.S.C.A., provides in presently material part that the court shall find the facts specially

and shall state separately its conclusion of law thereon; and that if an opinion or memorandum of decision is filed, it suffices if the findings of fact and conclusions of law appear therein. Under the clear command of the rule, it is the duty of the court to make adequate findings of fact and conclusions of law. This may be done by dictating into the record findings of fact and conclusions of law; by filing in the case written findings of fact and conclusions of law; or by including findings of fact and conclusions of law in the opinion or memorandum decision of the court. The rule does not require the making of elaborate findings of fact extending into minute and unnecessary detail in respect to every feature or phase of the case. The exaction of the rule is met in full measure if the findings of fact cover in clear, definite, and concise language the contested issue or issues in the case. Life Savers Corp. v. Curtiss Candy Co., 182 F. (2d) 4. The court did not dictate into the record findings of fact and conclusions of law. Neither did it file formal written findings of fact and conclusions of law. But the court did file a written opinion which contained findings of fact and conclusions of law. And while the opinion may not have been as complete as might have been desired in respect to the making of findings of fact, we think it is wholly unnecessary to remand the case for the making of additional findings.

The court found among other things that prior to the time of the alleged conversion plaintiffs had more than received back the amount which they invested in the installation of the two water systems. The finding was in the form of a footnote to the opinion of the court, but it was in substance a finding of fact and must be considered as such. Plaintiffs were developers of subdivisions. Their business was that of subdividing tracts of land and selling the lots to the public for down payments in cash and peri-

odic payments in cash thereafter until the purchase price was paid in full. They subdivided certain tracts of land adjacent to the City and County of Denver and sold lots for small down payments and small payments from time to time thereafter. And the two water systems were installed to furnish a supply of water to the purchasers of lots and other inhabitants of the subdivisions. In all but one or perhaps two of the subdivisions served by the Bel-Adams System, as lots were sold a charge of $25.00 per lot was made for the right to tap the watermain. The purchaser was required to pay such charge before getting a deed. And the amounts thus charged and collected were used to reimburse plaintiffs for their investment in the water system. No like charge was made and collected in connection with the sale of lots in the subdivisions served by the Schaefer System. But the cost of the system was treated as a tract expense. It was prorated among the several lots within the subdivision and the sale prices were enhanced accordingly. As each subdivision was platted an aggressive campaign for the sale of the lots was carried forward. Advertising was employed. Emphasis was placed on the availability of water for domestic use. And lots aggregating many hundreds in number were sold. No useful purpose would be served by detailing at length the evidence which tended to throw light in varying degrees upon the amount which plaintiffs had received as reimbursement for the installation of the two systems. It suffices to say that we think the finding of the court that plaintiffs had more than received the amount invested in the installation of such systems was adequately sustained by the evidence and the inferences fairly to be drawn from the evidence; and therefore such finding must stand on appeal.

The City and County of Denver is a single municipal subdivision of Colorado. At the time of the platting of

the several subdivisions and the installation of the two water systems, the subdivisions lay outside of the territorial limits of such city and county. Purchasers of lots within the subdivisions erected residences thereon, and these were connected with the water system serving the particular subdivision. While some of the water furnished to the inhabitants was obtained otherwise, much of it was obtained through purchase by those operating the systems from the city and county. The water thus obtained was metered into the systems and then made available to consumers within the subdivisions. After the systems had been installed and while being used for the purpose of furnishing water to the inhabitants of the subdivisions, the territory within the subdivisions was through appropriate procedure annexed to the city and county. Instead of providing new or different water facilities for such consumers, the city and county took over and used the pipes, connections, fittings, and other like facilities of the systems already installed. The water systems were installed for the purpose of making the lots within the subdivision salable and usable for residential purposes. Their intended purpose from the outset was to serve the purchasers of lots, the consumers of water, and the public. And prior to the annexation of the territory to the City and County of Denver, the Public Utilities Commission of Colorado issued conventional certificates of convenience and necessity for their operation. The acts and conduct of plaintiffs, considered as a whole, constituted a dedication in law of the systems to the use and benefit of the owners of lots, the consumers of water, and the public. And under the express findings of the court, at the time of the annexation plaintiffs had been completely reimbursed for their investment in the systems. Under such findings, plaintiffs did not then have any un-repaid investment in the property. The water systems having been dedicated to a public pur-

pose, plaintiffs having been completely reimbursed for their investment in such systems, the territory within which the subdivisions were located having been validly annexed to the city and county, and the city and county being under the duty to protect the public health, welfare, and safety of the inhabitants of the annexed area, the action of the city and county in taking charge and control of such systems for use in furthering the public purpose to which they were dedicated did not constitute the wrongful taking or appropriation of property of plaintiffs which rendered the city and county liable in damages for conversion. Ford Realty & Construction Co. v. City of Cleveland, 164 N. E. 62; Suburban Real Estate Co. v. Incorporated Village of Silverton, 167 N. E. 474; City of Danville v. Forest Hills Development Corp., 182 S. E. 548; Royal Oak Township v. City of Ferndale, 15 N. W. (2d) 707; South Memphis Land Co. v. City of Memphis, 74 S. W. (2d) 209; Spaugh v. City of Winston-Salem, 68 S. E. (2d) 838 . . .

The judgment is affirmed.

APPENDIX C

Judgment of the Court of Appeals Entered August 27, 1956

Theses causes came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and were argued by counsel.

On consideration wheretof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX D

Rule 52(a), Federal Rules of Civil Procedure

FINDINGS BY THE COURT

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). (As amended Dec. 27, 1946; eff. March 19, 1948.)

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OCTOBER TERM, 1956

No. 357

HARRY C. TRENTMAN AND AUBREY MILNER,
Co-Partners, Petitioners,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO, a municipal corporation; BOARD OF WATER COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO; GEORGE R. MORRISON, AUGUST P. GUMLICK, NICHOLAS R. PETRY, HUDSON MOORE, JR., substituted for RAYMOND W. JOHNSON, and ROBERT S. KOHN, substituted for KARL C. BRAUNS, members of the Board of Water Commissioners of the City and County of Denver, Colorado,

Respondents.

BRIEF OPPOSING THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REASONS FOR DENYING THE WRIT

Petitioners were plaintiffs in the trial court and appellants in the Court of Appeals. For the sake of convenience of consideration, we shall answer the reasons ad-

vanced by the petitioners for granting the writ of certiorari in the same order as was used by petitioners.

1. THERE IS NO NEED FOR FURTHER AUTHORITATIVE INTERPRETATION OF RULE 52(a).

Petitioners' first contention is that there is a necessity for an authoritative determination of the meaning and application of Rule 52(a) of the Federal Rules of Civil Procedure with respect to the sufficiency of findings of fact.

In answering this contention of the petitioners it is interesting to note that even the petitioners state that there are hundreds of cases involving this rule, yet the petitioners would add still another decision to the innumerable decisions already made. This would serve no useful purpose because the law is already well settled.

Writs of certiorari are addressed to the sound discretion of the court and will be granted only where there are special and important reasons therefor. (Rule 19(1) Supreme Court Rules.) This rule places the burden upon the petitioners of demonstrating the special and important reasons for granting the writ. In this case, petitioners have merely asserted that there is a necessity for an authoritative determination of the meaning of Rule 52(a). Petitioners must go further, if they are to succeed, and demonstrate that their assertion is correct.

We believe that the law regarding fact finding under Rule 52(a) has been determined in an authoritative way and the decisions upon the subject matter are uniform. First of all, Rule 52(a) as amended March 19, 1948, provides in part:

> "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

In this case, the findings of fact and conclusions of law are contained in the Opinion of the trial judge. (R. 66. See also Appendix A of petitioners' petition for writ of certiorari, wherein the trial court's opinion is set forth.) The trial court need only find such ultimate facts as are necessary to reach the decision. *Oedekerk v. Muncie Gear Works, Inc.*, U.S.C.A. 7 Cir. (1950) 179 F. 2d 821, 823. The judgment should stand if the opinion below gives the appellate court a clear understanding of the basis of the decision. *Klimkiewicz v. Westminster Deposit & Trust Co. et. al.*, U.S.C.A. Dist. of Col. 122 F. 2d 957, 958 (1941). See also *Burnham Chemical Co. v. Borax Consolidated*, U.S.C.A. 9 Cir. (1948) 170 F. 2d 569, 574; Certiorari denied 69 Sup. Ct. 655, 336 U.S. 924, re-hearing denied 69 Sup. Ct. 878, 336 U.S. 955, 93 Law. Ed. 1109. See also *Hazeltine Corporation v. General Motors Corporation*, U.S.C.A. 3 Cir. (1942) 131 F. 2d 34, 37.

It would not be in accordance with common sense to reverse a case and send it back to the trial court for alleged technical insufficiencies in the findings of fact when the Opinion of the trial court gives the appellate court a clear understanding of the basis of the decision, and that decision appears to be correct. In this case, a reading of the Opinion of the trial court readily affords a clear understanding of the basis of the decision.

Petitioners cite the case of *Mayo v. Lakeland Heights Can. Co.*, 309 U.S. 310, 316. The case is readily distinguishable. The court's remarks therein were based upon a situation where there was an inadequate statement of facts upon vital issues and where such factual issues were not resolved. The lower court was reversed because it dealt with the wrong issue on a motion for a temporary injunction. In the present case, the trial court cut through directly to the vital issues and determined the facts necessary to the decision made by the court.

2. BURDEN OF PROOF

The petitioners argue that the findings of the trial judge, as contained in his Opinion, resulted in shifting the burden of establishing the affirmative defenses from the defendants and fastening upon the plaintiffs the necessity of disproving them. This statement by the petitioners presents a most curious argument. First of all, the court's attention is called to the fact that petitioners nowhere point out how and where the burden of proof was actually shifted. We have carefully scrutinized the opinion of the trial court (R. 66-72. See also Appendix A to petitioners' petition for writ of certiorari) and we have been unable to find the slightest basis for such a statement. Nowhere in the Opinion does the trial judge expressly mention burden of proof. The trial judge, in his Opinion, merely proceeded to find the facts as to plaintiffs' first cause of action, and then find the facts as to the plaintiffs' second cause of action. The plaintiffs (petitioners here) certainly are not entitled to assume that the trial judge did not know the law upon the question of burden of proof. The presumption is that the trial judge did know the law relating to the burden of proof, unless the contrary be specifically shown. This Court is referred to footnote 10 to the trial court's Opinion which contains, among other things, the following language (See part of footnote 10 of trial court's Opinion at page 10 of petitioners' petition for writ of certiorari):

> "Significantly, in the case at bar the evidence is convincing that plaintiffs have more than received back the amount they invested in installing the two systems in question."

This Court's attention is called to this strong language used by the trial court. In the ordinary civil suit he who has the burden of proof must prove his claim by a preponderance of the evidence. In certain cases in the western part of the United States involving water law, the burden of proof is extended to require clear and convincing

evidence. In criminal cases the burden of proof is further extended to require proof beyond a reasonable doubt. In this case, the trial judge said that the evidence is convincing. The trial judge was undoubtedly familiar with western water law cases in which clear and convincing evidence is required. Thus, it will be seen that the trial judge thought that the plaintiffs more than received their money back, and that this fact was established by more than a preponderance of the evidence, rather it was established by convincing evidence.

On the question of burden of proof, the petitioners cite the case of *Owen v. Commercial Union Fire Insurance Co.*, U.S.C.A. 4 Cir. (1954) 211 F. 2d 488, 489. However, this case in no way helps the petitioners, for in said case the trial judge specifically held that the burden of proof rested upon the plaintiffs when the law was clearly to the contrary. Nowhere in our present case does the trial court make any such erroneous finding. On the contrary, everything indicates that the trial judge knew his law well and placed the burden of proof exactly where it belonged.

3. EVIDENCE SUPPORTING THE JUDGMENT OF THE TRIAL COURT

The petitioners state that the judgment of the District Court, affirmed by the Court of Appeals, was entirely without foundation in evidence. Upon this basis, petitioners argue that the United States Supreme Court should grant writ of certiorari. This is not an appropriate time and it would serve no useful purpose to review all of the evidence supporting the decision of the trial court and the affirming of that decision by the Court of Appeals. We do refer this Court to a reading of the trial court's Opinion and the Opinion of the Court of Appeals. We should like to call this Court's attention in particular to the Opinion of the

Court of Appeals which states, among other things (See page 15 of petitioners' petition for writ of certiorari):

> "No useful purpose would be served by detailing at length the evidence which tended to throw light in varying degrees upon the amount which plaintiffs had received as reimbursement for the installation of the two systems. It suffices to say that we think the finding of the court that plaintiffs had more than received the amount invested in the installation of such systems was adequately sustained by the evidence and the inferences fairly to be drawn from the evidence; and therefore such finding must stand on appeal."

4. THE JUSTICE OF THE CASE

Petitioners contend that the judgment below represents a gross miscarriage of justice, claiming that they have been deprived of their property without the payment of just compensation. Petitioners then proceed to repeat their earlier contentions stating that there was not a proper finding of facts and that the trial judge improperly shifted the burden of proof. These last two statements are merely repetitious of petitioners' earlier statements and we shall say nothing further in answer to them. However, we should like to say a few words about the justice of the case.

As stated in the Opinion of the trial court (See R. 66 and Appendix A of petitioners' petition for writ of certiorari), the plaintiffs sold lots to various people and advertised that water would be available, and in consummating sales the plaintiffs used contracts which provided that the purchasers pay twenty-five dollars ($25.00) per twenty-five (25) foot lot for water mains. Other lots were sold and the cost of installing water mains was charged as a tract expense, but the availability of water was publicized and its presence was reflected in higher sales price. On March 27, 1947, the area involved, which was adjacent to Denver,

was annexed to the City and County of Denver. Notwithstanding the petitioners' bald claims to the contrary, the trial court stated that the evidence is convincing that plaintiffs have more than received back the amount they invested in installing the two systems in question. (See Opinion of trial court R. 66 and Appendix A of petitioners' petition for writ of certiorari.) As already indicated, the Court of Appeals states that the finding of the trial court to the effect that plaintiffs had more than received the amount invested in the installation of such systems was adequately sustained by the evidence and inferences fairly to be drawn from the evidence. (See page 15 of petitioners' petition for writ of certiorari.)

Plaintiffs have more than received back their investment in these systems and their property certainly has not been taken without compensation. They have been paid. Their entire lawsuit has been an effort to collect from the people of the City and County of Denver for systems which have already been paid for by the users of the systems who are presently citizens of the City and County of Denver. The justice of the case is that those who have already received payment for certain water systems shall not be paid for those water systems a second time.

5. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN C. BANKS,
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and County of Denver,
and the other respondents
herein.